

FILED
MAY 20 2008
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BARTH DENNIS CAPELA,
Petitioner,

v.

BOB HOREL, Warden,
Respondent,

No. C 07-04734 SBA (PR)

MOTION TO AUGMENT THE RECORD TO
INCLUDE A LETTER FROM PETITIONER
TO TRIAL COURT JUDGE KENNETH SHAPERO
IN SUPPORT OF THE CHARGE OF ATTEMPT
ROBBERY WAS IMPROPERLY FILED AFTER
A HEARSAY PRELIMINARY EXAMINATION

The letter to the Judge is
dated April 29, 2004 and trial
started on April 2, 2004

The charge of attempt robbery (PC212) was improperly filed after what is known as a prop 115 hearing. There was no new evidence on which to base a newly filed charge. The Petitioner was Pro Se before and during trial, without having access to a library or law books. This issue was encluded in the original HABEAS Petition filed with this Court. Petitioner had to rely on a legal service for research in the county jail before and during trial known as the (LRA) legal research associates. Put plainly the (LRA) was not an effective method for performing research, nor were they forthcoming with the information requested on the issue described above. On several occasions a request for imformation on whether it was legal for the Prosecutor to file after a hearsay prelimination exam of the charge of attempt robbery, but the information was not given. In the attached letter marked as Exhibit "H" to the trial court Judge it clearly shows (1) The LRA did not provide the requested information on this issue before trial commenced. And (2) The Judge was aware of the improperly filed charge but chose not to act on it. Normally this type of issue is considered to be a pretrial challenge. But as explained above this is the exception to the rule. This is a clear violation of Due process, the Fifth and Fourteenth Amendments of the U.S. Constitution. The Calif. Constitution Article 1 section 14 dictates a Prosecutor can not bypass a preliminary hearing by filing charges after the hearing when the charge is a felony. It must go through the legal process of a preliminary hearing by law. This is so because the Judge is fluent in law where as a jury is not, and can be persuaded by feelings not rooted in law. Please see arguments on this issue contained in Petition.

A rule of Court is,a Judge must uphold a Defendant's RIGHTS,even when he may not be aware of them.In this case that rule was not upheld.In Witkin, rules and procedures,it states in part;"A Prosecutor may exercise his right to proceed without the victim or star witness at a preliminary hearing, but thereafter he forfeits any opportunity to file new Charges based on new evidence that might have arose at that preliminary hearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BARTH DENNIS CAPELA,
Plaintiff,

Case Number CV07-04734 SBA
CERTIFICATE OF SERVICE

v.

BOB HOREL et al,
Defendant

I, the undersigned, hereby certify that I am the Petitioner in this case, in the U.S. District Court, Northern District of California.

That on May 19, 2008, I served a true copy(ies) of the attached, by placing said copies in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. mail, by placing said copies into the mail box here at Solano Prison.

Office of the Clerk, U.S. District Court
Northern District of California
1301 Clay ST. Suite 400s
Oakland, Ca. 94612-5212

Office of the Attorney General
455 Golden Gate Avenue Suite 11,000
San Francisco, Ca. 94102-7004

Date May 19, 2008

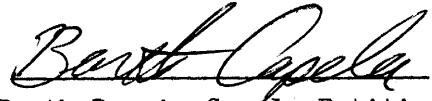

Barth Dennis Capela Petitioner

EXHIBIT
"H"

Berthi Capsla
DSN081#03043864
885 N. San Pedro St.
San Jose, Ca. 95110

To Judge

Kenneth Shapero
12425 Monterey Road
San Martin, Ca 95046
FAX 408 273-2980

APR 29 2004

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EXHIBIT

"H"

Rec'd
4-29-04

Dear Sir, The last time I was in your Court we were discussing the 5 year washout period. And I was trying to explain that a Revocation, return to prison does NOT play a part of the 5 year washout time. Well here is the case I was referring too, "Enclosed" in this letter.

Also, I have a question for you. Is it legal for the D.A. to file a charge after the prelim, when no new evidence comes forth from the Prelim? Such as ATTEMPT Robbery in this case. And since Kipp Davis was the Attorney of Record at the time those charges were put on me. Why would he not challenge the filing of those charges? eg. P.C. 995 and or Prohibition. And is there anything now that you can do to CORRECT this injustice before it gets CORRECTED in the Appellate Court?

Case No. FF302986

To Judge Shapero

From Barth Capela

4-27-04

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Barth D. Capela #V58262
C.S.P. Solano, P.O. Box 4000
Vacaville, Ca. 95696-4000

CSP SOLANO
STATE PRISON
California



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Confidential Mail
Legal Mail

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